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Supreme Court of the United States

No. 203—October Term, 1952

In the Matter
of

THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY,

Debtor.

THE CITY OF NEW YORK,

Petitioner,

against

THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit

BRIEF FOR THE PETITIONER

DENIS M. HURLEY,
Corporation Counsel of the
City of New York,
Municipal Building,
New York, N. Y.

SEYMOUR B. QUEL,
HARRY E. O'DONNELL,
MEYER SCHEPS,
ANTHONY CURRERI,
of Counsel.

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BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Appeals (R. 94-106) is reported at 197 F. 2d 428; the opinion of the District Court (R. 80-92), which was adopted by the majority of the Court of Appeals, is reported in 105 F. Supp. 113.

Jurisdiction

The decision of the Court of Appeals was handed down on June 5, 1952 and the order thereon (R. 106-107) was

entered on the same day. The petition for a writ of certiorari was filed July 16, 1952 and was granted October 13, 1952 (R. 108). The jurisdiction of this Court rests on 28 U. S. Code, § 1251(1).

Questions Presented

The issue in this proceeding is whether the City was required to file a notice of claim with the trustees in reorganization in order to preserve its statutory liens for local assessments against specific parcels of real property.

The City contends that since under the applicable New York statutes its liens ran only against the specific properties involved and did not involve any *in personam* liability upon the part of the Railroad, the filing of a notice of claim would have been a futile gesture upon its part. Stated differently, the filing of a notice of claim could have related only to the distribution of the general assets of the Railroad, in which the City had no right to participate. Accordingly, the failure of the City to ask for participation in assets in which it had no right to share cannot be construed as constituting a discharge of its *in rem* liens on specific parcels of real property owned by the Railroad.

The Railroad Reorganization Act (§ 77 of the Bankruptcy Act) defines creditors as those having claims; defines claims as including liens; and provides that failure to file a claim bars participation in the assets of the railroad in reorganization. Section 77 nowhere expressly provides that the failure to file a claim shall operate to discharge a tax lien, or indeed any *in rem* lien, so as to remove the encumbrance thereof from the lien property.

Concededly, in bankruptcy proceedings the failure of a lienor to file a claim does not operate to discharge the lien. There is no reason to suppose, and indeed all the evidence is to the contrary, that Congress by enacting the Railroad Reorganization Act as part of the Bankruptcy Act intended to abrogate the traditional right of a lienor in bankruptcy.

The first question presented, therefore, is whether, contrary to the historical treatment of tax liens in bankruptcy, the holder of *in rem* tax liens (for which no personal liability exists), which were imposed upon specific parcels of the Debtor's real property prior to the inception of proceedings to reorganize such Debtor under § 77 of the National Bankruptcy Act, is a creditor within the meaning of subdivision (c) (7) thereof.

If the first question is answered affirmatively, then the second question presented is whether, under the provisions of § 77 (c) (8) of the National Bankruptcy Act requiring "reasonable notice" to a creditor "of the period in which claims may be filed," such reasonable notice is afforded to a creditor, whose name and whereabouts are known to the debtor and its trustees, merely by publication of a notice to file claims pursuant to a general order requiring such filing, particularly where the creditor is not named, either in the general order or the published notice.

Thirdly and finally, even assuming that a lienor is ordinarily required to file a notice of claim in order to protect his lien, the question is presented whether the facts in this case indicate that the orders of the Reorganization Court were not intended to abrogate the City's assessment liens. Order No. 1, the very first order entered in the reorganization proceedings, expressly provided that the trustees pay all taxes and assessments due or to become due upon the properties of the Railroad. In the light of that order and further orders and procedures which are referred to hereafter in our brief, it is clear that there was no intent to nullify the City's assessment liens.

Statutes Involved

The statutes involved, which are the pertinent sections of the Bankruptcy Act, are printed in the appendix to this brief.

Statement

The proceeding now before this Court was instituted by the Railroad on November 2, 1950, by the filing of a petition in the United States District Court for the District of Connecticut. The petition sought a declaration that various assessment liens on specific parcels of real property owned by the Railroad located in the City of New York had been discharged by reason of the failure of the City to file a claim in the reorganization proceedings of the Railroad.

Prior to October 23, 1935, the date of the filing and approval of the Petition in Reorganization, and between June 8, 1894 and January 15, 1930, various assessments for local improvements were levied by the City of New York, and became liens on specific parcels of real property owned by the New York, New Haven and Hartford Railroad Company (R. 2, 6-16, 25, 82-83, 95). The principal amount of these liens is \$134,153.94 (R. 25, 82, 96). Together with interest to December 31, 1950, there was due to the City \$503,807.86 (R. 25). All of these parcels of real property are located in the Borough and County of Bronx, City and State of New York (R. 2). These assessments, all set forth in Exhibit A attached to the petition herein, were levied and became specific liens pursuant to and in conformity with applicable provisions of the Charter of the City of New York in existence at the time of each respective assessment levy and are enforceable exclusively and *in rem* only against the specific parcels affected (R. 25, 26, 82-83, 95). Until paid, each assessment lien is a first, prior and paramount lien against the parcel affected and is preferred in payment to all other charges (R. 26, 83).

For the purposes of this proceeding it must be assumed that these assessments, when first made, were validly imposed. The decision of the Courts below was predicated upon the assumption that these assessment liens were validly imposed and, following the lien property into the hands of the bankruptcy trustees, continued to have vitality until they were discharged by the Consummation Order and Final Decree in the reorganization proceedings (R. 82).

The last assessment in point of time prior to October 23, 1935, when the petition in the reorganization proceedings was filed, was entered on January 15, 1930 and became a lien, according to the applicable statute, on January 25, 1930 (R. 26, 82).

On October 23, 1935, the New York, New Haven and Hartford Railroad Company petitioned the District Court for its reorganization, pursuant to the provisions of § 77 of the Bankruptcy Act (R. 2). At no time during the course of the reorganization proceedings, which were not terminated until the Consummation Order and Final Decree of the District Court on September 11, 1947; did the City file a claim for its assessment liens (R. 85). On the other hand, at no time during the course of the reorganization proceedings were the assessment liens specifically brought into question before the District Court by the Debtor or its trustees (R. 18). No specific bar order was ever served upon the City of New York and no application was ever made in the District Court to determine the validity of these liens (*ibid.*).

Although the reorganized Debtor took title to this property by deed from the trustees dated September 18, 1947, it was not until more than three years later, on November 2, 1950, that it petitioned the District Court for instructions as to whether or not the Plan of Reorganization and the Consummation Order and Final Decree under which it took title required it to pay or assume any of the assessment liens in question (R. 4). In this petition for the first time the contention was made that Order No. 32 in the reorganization proceedings, dated January 4, 1936, a few months after the proceedings were instituted, constituted a complete bar to the City's assessment liens and required their cancellation and discharge (R. 3). Order No. 32 directed that claims of creditors be filed or evidenced by May 1, 1936 (R. 40).

The course of the development of the reorganization proceedings will be completely set forth and discussed hereinafter because it is an integral part of the petitioner's argument.

Summary of Argument

The Congress did not intend that statutory *in rem* tax or assessments liens, imposed prior to the inception of the reorganization proceedings upon specific parcels of real estate belonging to the Debtor, were to be considered as "claims" against the Debtor within the meaning of § 77(b) of the Bankruptcy Act. Consequently, the City was not a creditor within the meaning of § 77(c)(7) and was under no obligation to comply with the District Court's general order requiring the filing of claims. Its liens could not be discharged for failure so to comply. The Courts below conceded that their contrary decision was based upon *dictum* contained in *Gardner v. New Jersey*, 329 U. S. 565 (1947). If, as we contend, the construction of the *Gardner* case by the lower Courts went beyond its intendment, and the assessment liens of the City of New York are not included within the purview of § 77 of the Bankruptcy Act, then it follows that the reorganization Court had no power to discharge them by reason of the City's failure to file a claim.

Moreover, we contend, when the Railroad went into reorganization in 1935, nothing in the Bankruptcy Act as it then existed required the City to file a claim or to take any affirmative action in preservation of its liens. Either under the provisions of § 64(a) of the Bankruptcy Act as it then existed, which imposed upon the Debtor's trustees the affirmative duty of searching out and paying all taxes legally due and owing, or under the terms of the first order of the District Court in this reorganization proceeding authorizing the trustees to pay all taxes and assessments due upon the property of the Debtor, the City had a right to expect that its assessment liens would be paid or preserved. As a corollary right, it could also expect specific notice of any attack upon their validity.

But even if it be assumed (1) that the City *was* a creditor of the Debtor Railroad, and (2) that it might have been

required in a proper case to file a claim for its assessment liens, the City has been deprived of its property without due process of law if its liens were discharged simply by reason of its failure to file a claim as required by a general order of the District Court of which, at most, it received constructive notice by publication only. As a creditor whose name, address and interest were known to the Debtor, the reasonable notice required by the statute to be given to the City was not provided by the order and publication referred to, in neither of which was the City named.

Finally, independently of the questions of law hereinabove raised, an examination of the proceedings had in reorganization of this Debtor, the Plan of Reorganization certified by the Interstate Commerce Commission and the Consummation Order and Final Decree, reveals a complete lack of intent to affect the City's assessment liens, in consequence of which these liens were not materially or adversely affected by the Plan of Reorganization and survived the Consummation Order and Final Decree. In sum, from whatever aspect the proceedings below are viewed, the Courts below as a matter of law and fact erred in discharging the City's assessment liens.

ARGUMENT

POINT I

Statutory *in rem* tax or assessment liens, imposed prior to the inception of the reorganization proceedings, upon specific parcels of real estate belonging to the Debtor, are not "claims" against the Debtor within the meaning of § 77(b) of the Bankruptcy Act. Consequently, the City was not a creditor within the meaning of § 77(c)(7) and was under no obligation to comply with the District Court's general order requiring the filing of claims. Its liens could not be discharged for failure so to comply.

(1)

The decision of the Courts below rests entirely upon the premise that the definition of the word "claims" set forth in § 77(b) of the Bankruptcy Act encompasses the statutory assessment liens of the City of New York. It is our purpose, therefore, to demonstrate that at the inception of these proceedings in 1935 and in 1936, when Order No. 32 requiring the filing of claims was published, nothing in the Bankruptcy Act, including § 77 as amended in 1935, was intended to change pre-existing law and practice in bankruptcy with respect to statutory tax liens. When § 77 was enacted in 1933, the word "claims" was not defined and there was no indication that claims were intended to include liens. We shall further demonstrate that when in August, 1935, Congress added a definition of the word "claims" in § 77 (subdivision b thereof) and included in that definition the word "liens", it was not its intention thereby to embrace the encumbrances created by statutory tax liens of the character here involved.

Section 77 of the Bankruptcy Act was enacted in 1933. For the first time Congress provided a method of reorganizing a corporation which found itself in financial difficulties. Theretofore all of the provisions of the Bankruptcy Act

had dealt with the liquidation of estates of insolvent debtors and did not look to a preservation of their business, property and affairs.

In the years prior to 1933 tax claims and tax liens of states and their political subdivisions were governed by the provisions of §§ 64 and 67 of the Act. Section 64 provided an order of priority of payment of *debts* of bankrupts. Among such debts were those taxes which were legally due and owing by the bankrupt to states and their subdivisions. Because § 64 dealt with debts it was intended to cover only personal obligations of the bankrupt as distinguished from liens against his property. Under the provisions of § 67, as it existed in 1933, statutory liens for taxes were preserved and the trustee took his title subject to them. COLLIER, *Bankruptcy*, 14th Ed., Vol. 4, Par. 67.24, p. 201.

When § 77 was added to the Bankruptcy Act in 1933 it provided that proceedings under § 77 should be treated as in ordinary bankruptcy unless a specific provision of § 77 conflicted with some other specific provision of the Bankruptcy Act (§ 7, [1]). As § 77 stood in 1933, nothing appeared therein which was inconsistent with §§ 64 and 67 of the Bankruptcy Act. *Lyford v. State of New York*, 140 F. 2d 840, 845 (C. C. A., 2d Cir., 1944); REMINGTON, *Bankruptcy*, 1947 Replacement, Vol. 10, § 4239, p. 433. Furthermore, nothing in the debates or reports of committees of the Congress which preceded the enactment of § 77 in 1933 demonstrated an intent to depart in railroad reorganization proceedings from the ordinary method of treatment of statutory tax liens (Joint Hearings Before the Subcommittees of the Committees on the Judiciary [72nd Congress, First Session] on S. 3866, April 14, 1932, to April 28, 1932; Senate Report No. 1215, 72nd Congress, Second Session, submitted February 10, 1933 [Calendar Day, February 13, 1933], accompanying H. R. 14359; House Report No. 1897, 72nd Congress, Second Session, submitted January 23, 1933 accompanying H. R. 14359). Indeed, it affirmatively appears from the House Report (p. 5) that the purpose of

§ 77 was to do away with the expensive and protracted equity receivership procedure which was the only method by which interstate railroads could undergo reorganization and to make available to insolvent railroads the speedy and relatively inexpensive processes of the Bankruptcy Act.

Between 1933 and 1935 it became apparent that some of the provisions of § 77 were cumbersome, and especially was this true with respect to the provisions relating to voting by classes of creditors in adopting a Plan of Reorganization (House Report No. 1283, 74th Congress, First Session, p. 2; *Congressional Record*, 74th Congress, First Session, p. 13300 [Michener]).

Counsel for the Federal Coordinator of Transportation prepared a bill for introduction in the Congress intended to amend § 77 in a number of respects. The bill as introduced (H. R. 8587, 74th Congress, First Session), *inter alia*, added the definition of claims which now appears in § 77(b) and reads as follows:

"The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character."

It is noteworthy that nowhere in the hearings before the House Judiciary Committee, to which this bill was referred, nor in the reports of the Senate and House Judiciary Committees, nor in the debates on the floors of Congress was this particular amendment discussed or its purpose defined.

The prime purpose of the amendment of § 77 in 1935 was to provide "that two-thirds of those voting [on a plan of reorganization], whether they be creditors or stockholders, can bind all of a class, instead of two-thirds of the entire class, as in the present law. In other words, under the present law, a minority of one-third may block a reorganization. That is corrected by the bill H. R. 8587 which is now before us." *Congressional Record*, 74th Congress, First Session, p. 13301 (McLaughlin): see also House Report No. 1283, 74th Congress, First Session, p. 2. *Nowhere was it expressed or implied that the existing bank-*

ruptcy procedure with regard to statutory tax liens was intended to be altered or modified.

In the discussion on the floor of the House of Representatives, it was made manifest that no basic change in the policy theretofore existing with regard to railroad reorganizations was contemplated by the 1935 amendment. Representative Michener, a member of the House Committee on the Judiciary, which reported the bill out, stated (*Congressional Record*, 74th Congress, First Session, p. 13300):

"In passing upon this bill we are not embarking upon a new policy. When the Congress passed section 77 of the bankruptcy law this method of railroad reorganization was given legislative sanction. The purpose of this legislation is to accelerate railroad reorganization as contemplated when section 77 was enacted."

A careful reading of all of the hearings before the House Judiciary Committee, comprising 330 pages of printed testimony, reveals an absolute lack of intent to amend § 77 with respect to statutory tax liens (Hearings before the Committee on the Judiciary, House of Representatives, 74th Congress, First Session, on H. R. 6249 [later H. R. 8587]). As a matter of fact, the subject of taxes and tax liens never once arose in these extensive hearings. On the contrary, Mr. Leslie Craven, counsel to the Federal Coordinator of Transportation, in expounding to the House Judiciary Committee the proposed amendments which he had drafted, pointed out that the purpose of the 1935 amendments was not to change priorities and other rights, as provided by the law of land, but to insert in § 77 express recognition thereof. He said (*id.*, at p. 60):

"You do not want to forget the substantive provisions that I read to you yesterday, in which we require that there must be a recognition of priorities and other rights as provided by the law of the land. There is not anything like that in the present section 77. This law has more substance in it to protect rights than section 77 has."

His extensive discussion of the bill was confined to an exposition of the reasons underlying the main purpose of the amendment. In his concluding remarks he adverted to the fact that the bill contained other changes but he characterized these as being "minor" and he stated unequivocally that these changes were "not of particular significance" (*id.*, at p. 61).

We infer from all of the foregoing that the inclusion for the first time of a definition of the word "claims" was not intended to enlarge the class of creditors as previously defined in the 1933 enactment of § 77. In this connection it is significant that the definition of the word "creditors" was not materially changed by the 1935 amendment of § 77.

In ordinary bankruptcy, statutory tax liens on real property have always been considered as outside the reach of the bankruptcy court. Subdivision b of § 67 recognizes the validity of statutory tax liens and even provides that they may be perfected after the filing of the petition in bankruptcy. It has been recognized that this provision applies under § 77 since it is not inconsistent therewith. COLLIER, *Bankruptcy*, 14th Ed., Vol. 5, Par. 77.21, p. 540; REMINGTON, *Bankruptcy*, 1947 Replacement, Vol. 10, § 4239, p. 433. Indeed, REMINGTON, while recognizing that there is no inconsistency between §§ 77 and 67(b), goes further and states that statutory liens are entitled to the same protection in railroad reorganizations as they had in receiverships. It is clear, then, that at the time of the enactment of § 77 in 1933, there was no intention to subject the holders of statutory tax liens on real property, such as those here involved, to the necessity of filing proofs of claims in railroad reorganization proceedings in order to protect and preserve their liens. Had it been the intention of Congress to make § 67 inapplicable to railroad reorganization proceedings, it would have been a simple matter to have so stated. And as we have already demonstrated, the subsequent amendment of § 77, which *inter alia* added thereto a

definition of the word "claims", was not intended to effect a substantive change in the law. At most, it was intended to enumerate the types of creditors who were already subject to the provisions of the law.

(2)

In our opinion, the conclusion reached by the Courts below results from the failure to distinguish clearly between (1) a tax lien on real property, (2) a tax lien on personal property, and (3) a tax unaccompanied by any lien and enforceable only as a debt due from the bankrupt.

In 1935, when this reorganization proceeding was commenced, statutory liens for taxes owing to the United States or any state or subdivision thereof were recognized as valid liens against the bankrupt estate. It was always held that the trustee in bankruptcy took title subject to such liens. COLLIER, *Bankruptcy*, 14th Ed., Vol. 4, Par. 67.24, p. 201. The Chandler Act of 1938 was not intended to disturb statutory liens on real property. *Id.*, Par. 67.02, p. 33. In so far as statutory tax liens were concerned, the only change in the law effected by the Act of 1938 was to provide that such liens on *personal property* not in the possession of the lienor were to be postponed in payment to administration expenses and wage claims as provided for in § 64 (a) of the Bankruptcy Act. The validity of statutory tax liens on *real property* in the debtor's estate was recognized and continued in new subdivision b of § 67 of that Act. In sum, the treatment accorded statutory tax liens in the Bankruptcy Act from the date of its adoption (1898) to date has not changed.

In support of the distinctions above made, between tax liens and tax claims, the attention of the lower Courts was called to the decision in *De Laney v. City and County of Denver*, 185 F. 2d 246 (U. S. C. A., 10th Cir., 1950). While that case involved a statutory tax lien on personal property, and not real property, as here involved, the opinion contained what we consider to be significant lan-

guage pointing out that the provisions of § 64 of the Bankruptcy Act merely set up a system of priority of payment of debts and did not impinge upon the recognized basic principle that the debtor's estate is taken over by the trustee in bankruptcy subject to existing valid liens. Since the laws of Colorado did not require the tax lien there in question to be perfected by the seizure of the property, the Court in effect considered it as one of the liens protected by the provisions of § 67 (b) and squarely held that the filing of a notice of claim was not essential to its preservation. If, under the circumstances of that case, it was not necessary to file a notice of claim in order to preserve the statutory tax lien on personal property, it inescapably follows that it was not necessary for the City of New York to file a notice of claim to preserve its statutory liens on real property in this proceeding. They too were protected by § 67 (b). See also *In Re Harvey*, 122 Fed. 745 (D. C., E. D. Pa., 1903).

The Courts below held that the *De Laney* case had no application to the issue here involved because it was an ordinary bankruptcy and not a § 77 proceeding (R. 89). Furthermore, they decided that the principle laid down in the *De Laney* case—that a lienor need not file a claim but may rely solely on his lien—was restricted to cases in which the security is properly and solely in the lienor's possession, citing *United States Bank v. Chase Bank*, 331 U. S. 28, 33 (1947) (*ibid.*).

But in relying upon the *United States Bank* decision to weaken the effect of the holding in the *De Laney* case, it is clear that the Courts below erroneously construed the meaning of the former decision. In *Clem v. Johnson*, 185 F. 2d 1011 (U. S. C. A., 8th Cir., 1950), decided after the *De Laney* case, the holding in the *United States Bank* case was construed as being restricted to the facts in that case. There, a lienor sought to participate in the general estate of the bankrupt and also to protect the security of his lien. The rule that a filing of a claim in bankruptcy is not essen-

tial to the preservation of a lien, whether or not the liened property is in the lienor's possession, was reiterated in accord with the decision in the *De Laney* case (185 F. 2d, at pp. 1013-1014).*

Lastly, the "unequivocal prohibition" in § 77 (c) (7), upon which the lower Courts relied to distinguish the *De Laney* case (R. 89), is analogous to the provisions of § 57 (n) in that both sections set up statutes of limitations within which *claims* are to be filed. As pointed out in the *De Laney* case, *supra*, at p. 249, § 57 (n) applies to "tax claims, as distinguished from tax liens." It follows that the provisions of § 77 (c) (7) must also be held to apply to tax claims as distinguished from tax liens and that statutory tax liens may not be discharged by failure of the taxing authority to comply with a general order requiring the filing of claims.

(3)

It is not intended to be inferred from what has been said that the bankruptcy court is without power to deal with statutory tax liens. When the District Court took the property of the Debtor in *custodia legis*, it acquired jurisdiction over the specific parcels of real property to which the City's assessment liens had attached. But the power of the Court to deal with these liens did not include the power to bar them by a general order to file notices of claims. In *Gardner v. New Jersey*, 329 U. S. 565, 579-582 (1947), in enumerating matters with respect to tax liens into which the reorganization court might validly inquire, this Court gave no indication that these matters included power to discharge the liens for failure to file a notice of claim. As a matter of fact, it is made quite clear in the *Gardner* case

* The interpretation of the *De Laney* case by the Courts below, if permitted to stand, would present the anomalous situation of permitting a lienor of personal property in his possession to stand outside the bankruptcy while depriving a lienor of realty, particularly a tax lienor, of a similar right simply because such realty is not ordinarily found in the lienor's possession.

that even the power which exists may not be exercised unless affirmatively asserted (*id.*, p. 578, n. 7). In the present reorganization proceedings no jurisdiction over the City's liens was ever affirmatively asserted by the District Court between the inception of the proceedings and the entry of the Consummation Order and Final Decree.

In every case dealing with railroad reorganization proceedings which we have been able to discover and in which the legality of taxes assessed against the debtor was in issue, the reorganization court acquired jurisdiction either (a) by reason of the taxing authority's voluntary appearance (e.g., *Gardner v. New Jersey*, *supra*), or (b) by way of the trustee's application on notice to the taxing authority that the reorganization court adjudicate the legality or amount of the tax (e.g., *In re Denver & R. G. W. R. Co.*, 23 F. Supp. 298 [D. C., D. Colo., 1938]), or (c) by reason of the fact that the taxing authority had filed its claim for a tax which constituted a claim, unsecured by a lien on real property (e.g., *In Re New York, O. & W. Ry. Co.*, 25 F. Supp. 709 [D. C., S. D. N. Y., 1937]). We know of no reported decision in a railroad reorganization proceeding in which statutory tax liens were cut off because of the taxing authority's failure to comply with the requirements of a general notice to creditors to file claims.

Since the City of New York did not voluntarily appear in the reorganization proceedings or file its proof of claim therein, the only way in which the District Court could have exercised jurisdiction over the liens of the petitioner would have been upon the Trustees' application to the Court, on notice to the City, for an adjudication of the legality or amount of the assessment. At no stage in the reorganization proceedings was the District Court ever asked to assert any jurisdiction over these liens. At no time prior to the Consummation Order and Final Decree was the City of New York ever put on specific notice that the legality or the amount of these assessment liens would

be questioned. Thus, we contend that because the District Court never asserted jurisdiction over the City's assessment liens during the pendency of the reorganization proceedings it was error for it to entertain the application upon which the order appealed from was based.

(4)

We have refrained until now from a full discussion of *Gardner v. New Jersey*, 329 U. S. 565 (1947), which contains language which the Courts below characterized as "*dictum*" (R. 84), but upon which they nevertheless predicated their decision. Concededly, it is possible to read portions of the *Gardner* opinion out of context in such a way as to create the impression that it is decisive against the City in this proceeding. Thus, in the *Gardner* case, this Court said, for example (p. 573):

"The words 'all holders of claims' have no qualification and are sufficiently broad to include public agencies as well as private parties. The 'claims' of creditors include secured and unsecured claims. We find not the slightest suggestion that Congress left out the large class of tax claims which recurringly appears in reorganizations and often assumes, as here, large proportions."

Language of this kind would seem superficially to subject the City to the provisions of § 77. However, analysis of the decision and the record in the *Gardner* case reveals important and fundamental factual distinctions from the matter at bar. We think these distinctions make it apparent that the *Gardner* decision does not control the issue raised herein, and that the "*dictum*" expressed by this Court is limited and qualified by the facts. At any rate, the question whether specific notice to the taxing authority is necessary was not raised in the *Gardner* case and was not there decided since the State of New Jersey had voluntarily subjected itself to the Court's jurisdiction.

The *Gardner* case concerned taxes of the State of New Jersey which, by the laws of that state, constituted a *debt* due from the railroad for the recovery of which an action at law might be maintained. The statute creating this tax debt also made it a preferred debt in the case of insolvency. N. J. Stats. 54:29A-55. In addition, the New Jersey law provided that the taxes so imposed were and remained liens paramount to all other liens on the revenues and on all the real and personal property owned, used or controlled by the railroad company within the state. *Id.*, 54:29A-54. Thus was created a personal debt due from the railroad debtor secured by a general lien on all of its property within the state.

The assessment liens of the City of New York, here in question, do not arise out of a personal obligation or debt of the Railroad but consist solely of, specific liens upon the several parcels of its real property against which the assessments were levied. They are not, and never were general liens upon all of the real property of the Railroad. They were not at any time liens upon the revenues or personal property of the Railroad. Nor were they levied in the first instance as franchise taxes in connection with the operation of the Railroad. They were levied as assessment liens impartially on all real property benefited by the local assessment proceedings.

This distinction in fact is all important. It must be borne in mind that the State of New Jersey had a tax *claim* based upon an *in personam* debt due and owing from the railroad company which was secured by a general lien. As a holder of a tax claim, clearly it was a creditor within the meaning of § 77. The *Gardner* opinion correctly held "that the reorganization court had jurisdiction over the proof and allowance of the tax claims" of the State of New Jersey and that they were required to be filed within the time fixed under § 77(c)(7) (pp. 572-573). The "*dictum*" in the *Gardner* case upon which the Courts below relied must be read in the light of the fact that this Court was then discussing tax *claims* and not tax *liens*.

In this connection it is significant that in its brief to this Court, the State of New Jersey specifically stated (*Gardner v. New Jersey*, unofficially reported in 91 L. Ed. 504, 510):

"The filing of the proofs of claim merely constituted notice to the trustees of the existence of the state's tax liens and laid the basis, in the event of the applicability of § 64, for making a claim in the event the lien property was insufficient to pay in full the taxes and interest due the said state."

This statement of position was not controverted by the Court. If the State of New Jersey had not filed claims in the *Gardner* case, the only effect of the failure to file would have been to restrict it in the recovery of its taxes to levy upon the railroad's property within the State of New Jersey; it could not have participated as a general creditor in any of the other assets of the railroad, wherever they might be. In other words, by filing a notice of claim for the taxes due it as a debt from the railroad, the State of New Jersey was using "a traditional method of collecting a debt" and was subjecting itself to the consequences following upon that procedure. *Gardner v. New Jersey*, 329 U. S. 565, 573 (1947).

However, in that portion of the opinion which discussed the reorganization court's jurisdiction over New Jersey's tax liens (*id.*, pp. 575-578), the only conclusion reached was that the Court had "jurisdiction over all of the property of the debtor, including that on which New Jersey asserts a lien, and the power of the Court to deal with liens extends to the lien which New Jersey claims" (*id.*, p. 578). But the *Gardner* opinion did not hold that the power of the reorganization court to ascertain the validity and extent of such liens, the method of their liquidation or the extent of their relative priorities, included the right to cut off and bar such liens by a general notice to creditors to file claims. On the contrary, it specifically held that "valid

liens existing at the commencement of bankruptcy proceedings have always been preserved" (*id.*, p. 576). Implicit in the opinion, therefore, is the underlying recognition that whenever a bankruptcy or reorganization court seeks to assert its jurisdiction over tax liens, such jurisdiction must be exercised upon specific notice to the taxing authority unless it has already voluntarily appeared in the proceeding.

This broad power to deal with tax liens was based upon the obvious necessity of preventing a state from asserting a broad general lien of the type owned by New Jersey in such a manner as to "pull out chunks" of the estate from the reorganization court and thus obstruct the operation of the railroad (*id.*, p. 577). In contradistinction, it should be noted that the enforcement of the City's assessment liens could never achieve such a result. These assessment liens are levied by the City of New York only against specific parcels of real property which are deemed to have been benefited by a local improvement. Such assessments may not be made against a railroad's right of way but have been upheld against parcels of railroad property which were subsidiary in nature. *Matter of City of New York (Juniper Avenue)*, 233 N. Y. 387, 392-393 (1922).

Thus, foreclosure of such a lien could not disrupt the continuous operation of the railroad and would not result in its "being divided up and dismembered piecemeal." *Gardner v. New Jersey*, 329 U. S. 565, 577 (1947). If the reason for the grant of power to the reorganization court to deal with tax liens of a general nature rests upon the necessity in the public interest of safeguarding the railroad entity, the necessity for the application of this power to the City's assessment liens disappears. Moreover, if it be true that the assertion of jurisdiction over a general tax lien must be exercised on specific notice, then *a fortiori*, there is need for specific notice in the case of an attempt to exercise jurisdiction over a specific tax lien which in no

way affects the overall operation of the railroad debtor.*

This analysis of the *Gardner* case demonstrates that the opinion of the Courts below is based upon language which was not and could not have been intended to apply to the situation here presented. At no time during the course of the reorganization of the Railroad was the District Court asked to assert its jurisdiction over the City's assessment liens with respect to any of the matters into which, in line with the *Gardner* case, it could validly inquire. The order which the District Court signed early in the proceedings requiring ~~the filing of~~ claims and which was directed generally to all creditors (R. 39-41), in no way affected the rights of the City of New York.

It must be remembered that under no circumstances could the City of New York look to other property of the Debtor in payment of any particular assessment lien in the event that the specific parcel levied upon proved insufficient in value to satisfy the amount of the lien. Obviously, therefore, the City of New York does not stand in the position of a secured creditor, such as the State of New Jersey was in the *Gardner* case, with a tax claim or debt secured by a lien. We had no claim against the general assets of the Railroad which we could protect by proving and filing. We had no right to share as a creditor in the redistribution or reorganization of the Railroad's assets. The filing of a notice of claim would have been a futile act. It would have accomplished no more toward payment of the City's assessment liens than was already provided in Order No. 1 (R. 42), in which, at the very inception of the proceedings, the payment of taxes and assessments then due was directed. Thus, it is apparent that the filing of a proof

* While the Debtor has informed this Court that it has always taken the position that these assessment liens were invalidly imposed, we emphasize again that in the Courts below the validity of these liens was assumed. It must necessarily be assumed as well, therefore, that these liens were not imposed upon such portions of the Railroad's real property which constituted part of its right of way.

of claim would have given the City of New York no greater rights than it already had with respect to the payment of its assessment liens.

Before leaving this discussion of the *Gardner* case, it should be pointed out that the record on appeal to this Court in that case discloses that the original petition asking for reorganization under § 77 expressly referred to the taxes due to the State of New Jersey as a major reason for the necessity for reorganization (*Gardner* record, pp. 192-193). It was not contended below that the petition for reorganization of the respondent made any specific reference to tax claims or, for that matter, tax liens.

Furthermore, Order No. 1 in the *Gardner* case, which approved the petition, specifically prohibited the debtor from making any payment on account of taxes, assessments or other governmental charges, state or local, due or to become due, and whether theretofore or thereafter assessed upon its property or any part thereof in New Jersey, without further order of the Court (*id.*, p. 196). At the very inception of the *Gardner* proceeding, therefore, it was apparent that the validity of the taxes due the State of New Jersey was under attack. The third order of the Court, entered upon the personal appearance of the Attorney General of the State of New Jersey, restrained him and his successors from entering judgment on and issuing execution for the collection of taxes until the entry of the final decree or further order of the Court (*id.*, p. 195).

No such procedure was followed in the reorganization of the respondent. No order was ever served on the City of New York to show cause why the enforcement and collection of its assessment liens should not be restrained and no order of restraint was ever signed. On the contrary, the first order of the District Court authorized the Debtor, in its discretion, until further order of the Court, to pay all taxes and assessments already due without any restrictions whatsoever upon this direction (R. 42).

(5)

Since the City, as holder of these assessment liens, was not a creditor of the Debtor within § 77 of the Bankruptcy Act, the order requiring the filing of claims directed to creditors of the Debtor did not affect the City. In consequence, the Courts below erred in discharging the City's liens simply because the City did not comply with this order.

POINT II

When the Debtor went into reorganization in 1935, nothing in the Bankruptcy Act as it then existed required the City to file a claim or to take any affirmative action in preservation of its liens.

When the reorganization proceedings of the Debtor were instituted, and even at the time when the order directing general notice to creditors to file proofs of claim was signed (Order No. 32, R. 39-41), § 64 of the Bankruptcy Act as it then existed (prior to the amendment made thereto by the Chandler Act in 1938), put upon the trustee the affirmative duty of searching out and paying all taxes legally due and owing, without distinction between the state and federal governments. *De Laney v. City and County of Denver*, 185 F. 2d 246, 249 (U. S. C. A., 10th Cir., 1950). This Court has reserved decision on whether § 64 is applicable in reorganizations under § 77 because, it was said, § 77 alone is adequate to sustain the asserted jurisdiction of the reorganization court over all the property of the debtor. *Gardner v. New Jersey*, 329 U. S. 565, 578, n. 7 (1947). See also *Lyford v. City of New York*, 137 F. 2d 782, 785-786 (C. C. A., 2d Cir., 1943).

If § 64 was applicable to these proceedings when instituted, then clearly the City of New York was justified in relying upon the provisions of that section in expectation of payment or preservation of its assessment liens, unless the validity of its liens was called into question by some

affirmative action of the Court or the Trustees. Whatever changes were made to § 64 by the Chandler Act ought not to affect the argument above made. The City's liens had vested prior to its passage and nothing in the Chandler Act indicates a Congressional intent to construe it retrospectively. *Ginsberg v. Linder*, 107 F. 2d 721, 726 (C. C. A., 8th Cir., 1939).

If § 64 was not applicable to these proceedings when instituted, then the City of New York was justified in relying upon the provisions of the first order signed by the District Court in the reorganization proceedings authorizing the Trustees without more, in their discretion, to pay "all taxes and assessments *due* or to become due upon the properties, income, franchises or business of the Debtor" (R 42; emphasis supplied).

In either event, the City of New York was under no obligation to file a notice of claim or to take any affirmative action in preservation of its liens. It had a right to expect that its assessment liens would be paid or preserved. It necessarily had as well the reciprocal right to expect specific notice of any intention on the part of the Trustees to do otherwise.

The City's so-called failure to act in protection of its liens by not filing a proof of claim under the provisions of Order No. 32 cannot be construed as a waiver of its right to expect specific notice of an attack upon the validity of its liens. Much was made by the District Court and by the respondent of the fact that the City knew of the pendency of the railroad reorganization proceedings; but this is a far cry from saying that the City knew that the validity of its liens was under attack. It would be a strange rule of law which would require the City of New York, in protection of its specific real estate tax and assessment liens, to search the records of all bankruptcy and reorganization proceedings throughout the United States in order to preserve its liens by filing proofs of claim in every instance where the debtor owned real estate within the City.

The absurdity of such a rule of law is heightened when it is realized that our tax and assessment liens are imposed *in rem* and not *in personam* and that, in many instances, the City of New York does not even know who the owner of the property is. Even in those cases where tax bills are sent to a person who requests them, the person so requesting may be acting only as an agent for the true owner or may be a mortgagee or some other person interested in the payment of the taxes. The burden thus cast upon the City would require therefore that it also search the record for all last owners.

The fact of the matter is that it was never intended in this case to use the reorganization court as the forum for the determination of the validity of the City's assessment liens. This fact is expressly admitted by George H. Webster, the Railroad's Tax Agent. In his affidavit in support of the application to declare the City's assessment liens null and void, he states (R. 18):

" * * * it does not appear in any of the papers on file in the reorganization proceedings prior to the present petition that the liens of the City of New York were ever brought to the attention of the reorganization court, that said court ever passed on their validity or that said court had any knowledge of their existence; * * * "

The reason why these liens were never attacked in the reorganization court, he states, is that "it has always been and is the claim of petitioner and petitioner's trustees that the assessments set forth in Exhibit A attached to the petition herein were and are void as a matter of law" (R. 18).

It is thus clear that the question of the validity of the City's assessment liens was not raised during the pendency of the reorganization proceedings because the Debtor and its Trustees took the position that the liens were void *ab initio*. From the date of the original petition to the entry of the final decree, 12 years later, not *once* did the Trustees, their counsel or the Debtor apprise the District Court

of the existence of the City's assessment liens, much less ask the Court to pass upon their validity. Three years after the final decree, the Railroad for the *first* time, informed the District Court that these liens existed and asked that court to rule that they had been discharged. The District Court held that the liens were discharged, not because of initial invalidity in their imposition, but because of the failure of the City to file a claim in the reorganization proceedings. In short, through the medium of what appears clearly to have been a deliberate, though secret, plan on the Railroad's part, the City is barred from asserting its liens. In effect, the District Court unwittingly lent its aid to this scheme and device.

The entire conduct of the Debtor and its Trustees throughout this proceeding is consistent with the position above stated by Mr. Webster. The statement of assets and liabilities which Order No. 1 of the District Court required the Debtor to file on or before November 30, 1935 (R. 45), made in pursuance of the provisions of § 77(c) (4), admittedly never set forth the City's assessment liens (R. 20). What is more significant is that the Debtor never included among its liabilities *any* tax liabilities which existed prior to the inception of the reorganization proceedings (*ibid.*). Obviously, the Debtor recognized that under the provisions of Order No. 1 it was required to pay tax liabilities which were then due and owing.

Whether or not the Railroad, before entering into reorganization, was justified in taking the position that the assessment liens in question were invalid and therefore did not have to be paid, that position was not one which the Trustees as officers of the Court could maintain. Faced with the affirmative duty to pay taxes and assessments pursuant to the provisions of Order No. 1 in the reorganization proceedings, they had no right to adopt the position of the Railroad in respect to the validity of the City's assessment liens and remain silent. They were required to pay these liens or to petition the reorganization court for an adjudication as to their legality. Obviously, if such an appli-

cation had been made, the City of New York would have received adequate notice thereof and would have been given ample opportunity to be heard in defense of the legality of its liens. By the Trustees' failure to take such steps, by their deliberate concealment from the Court and from the Interstate Commerce Commission of the very existence of the City's liens, they permitted the reorganization to be consummated without any adjudication on the matter. Thus, the validity of the assessment liens of the City of New York was decided by the private opinion of the Railroad. It is inconceivable that this Court will countenance this arrogation of the judicial process.

POINT III

Assuming *arguendo* (1) that the City was a creditor of the Debtor Railroad and (2) that it might have been required in a proper case to file a claim for its assessment liens, the City has been deprived of its property without due process of law if its liens were discharged simply by reason of its failure to file a claim as required by a general order of the District Court of which, at most, it received constructive notice by publication only. As a creditor whose name, address and interest were known to the Debtor, the reasonable notice required by the statute to be given to the City was not provided by the order and publication referred to, neither of which named the City.

The courts below have held in effect that the City of New York was a creditor required to comply with the provisions of Order No. 32 of the District Court in which the Court set the time in which claims were to be filed. Because the City of New York did not file a claim, it has been held that it is barred from participating in the reorganization proceedings and its liens have been forever discharged. We submit that the result below rests upon a total disre-

gard of the notice requirements of § 77, which, as Judge FRANK pointed out in his dissenting opinion below, were designed for the protection of creditors. *In Re N. Y., N. H. & H. R. Co.*, 197 F. 2d 428, 429 (U. S. C. A., 2d Cir., 1952) (R. 96).

It is readily demonstrable that the error below was based upon a failure to comply at the outset with the provisions of § 77 (c) (4). That subdivision requires the District Court to direct "the trustees * * * to file with the court a list of all known * * * creditors of the debtor, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each * * * creditor * * *" (emphasis supplied). The District Court never directed the filing of such a list. In fact, no list was ever filed containing the name of the City or referring to its assessment liens, although the respondent freely admits that the Debtor and the Trustees knew about them (R. 18). When the District Court ordered notice to creditors of the time within which they were required to file claims, it compounded its original error of failing to require the Trustees to file a list of all known creditors. By providing that notice of its bar order be given (1) by mail to creditors who had entered appearances up to that date and to the mortgage trustees (whose liens were obviously junior to those of the City), and (2) by publication to all other creditors whether known or unknown, the District Court did not direct or provide that notice by mail be given to all creditors whose names and addresses were known to the Debtor.

As far as notice of the bar order was concerned, therefore, the District Court provided for notice by mail to "appearing" creditors rather than to "known" creditors. While it is true that § 77(c)(8) requires only that "reasonable notice of the period in which claims may be filed, * * * be given to creditors * * *" and does not in terms refer to "known" creditors as contrasted to "appearing" creditors, it is not by accident that the provision for a list of "known" creditors contained in § 77(c)(4) precedes § 77(c)(8). The

Congress obviously intended that the District Court should cause appropriate notice to be given to all "known" creditors, and that such notice would be different from that given to unknown creditors.*

The nub of the problem therefore is what may be done in the District Court when the statute requires that reasonable notice be given. Certainly, whether or not a creditor is entitled to more than constructive notice by publication of an order requiring it to file claims should not be made to rest upon a distinction between appearing and non-appearing creditors. Such a distinction runs contrary to the requirement for the giving of reasonable notice. Obviously, it is not the creditor who has appeared who is most in need of notice of the bar order; it is the creditor who has not appeared, such as the City, who needs the notice prescribed by the statute of the period limited for filing claims.

The giving of notice by publication is a legal fiction, resorted to only in those cases where it is not reasonably possible or practicable to give more adequate warning. *Mullane v. Central Hanover Trust Co.*, 339 U. S. 306, 317, 320 (1949). This Court has not hesitated to strike down as violative of due process a statute providing for service of notice by publication in circumstances where the person

* The respondent argued below that in any list of creditors which it would have prepared the City's name would have been omitted because the Debtor and its Trustees had from the entry of the first of these assessment liens disputed their validity (Railroad's Brief in Court of Appeals, pp. 32-33). This argument overlooks the clear instruction of the statute that such a list include *all* claims, whether admitted or not, since it specifically provides that "the contents of such lists shall not constitute admissions by the debtor or the trustees in a proceeding under this section or otherwise." § 77(c)(4). This argument did, however, lead Judge FRANK, below, to suspect "that the real reason behind the trustees' silence may just possibly have been that something would happen exactly like that which did happen here, i.e., the City, not receiving notice of the bar order, would not file claims; its unfiled claims would be by-passed in the reorganization plan; and the new company would then assert that, after final decree, those claims were worthless" (R. 96).

sought to be notified was known to the moving party and could easily have been notified by mail. Exceptions to this rule, which in the *Mullane* case were noted and approved (339 U. S. pp. 316-317), present situations which do not parallel the facts at bar. The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U. S. 385, 394 (1914). "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Trust Co.*, *supra*, p. 314.

Quite appropriate to the circumstances of this case is the language which was used by this Court in the *Mullane* opinion (339 U. S., at p. 315):

"But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. * * *

It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint." *

* Order No. 32 provided for notice of its terms by mail to the Railroad's mortgage trustees. It is crystal clear that notice to the

Although the City did not receive the reasonable notice of the bar order required by the statute, the Courts below have held that the constructive notice afforded by the publication of the bar order was sufficient to foreclose the City from asserting its rights under its assessment liens. This holding was made despite the fact that neither the bar order nor the published notice named the City. The holding of the Courts below was based upon the bare fact that the City knew that the Railroad was going through reorganization. There is, of course, complete absence of proof that the City knew of the existence of the bar order or that its terms were intended to affect the assessment liens.

The burden which the decision of the Courts below thus casts upon the City of New York is unsupportable. The

same degree, *at the very least*, should have been given to tax lienors like the City of New York, whose liens are unquestionably paramount to the mortgage liens. Instead, however, Order No. 32, without naming The City of New York, provided for publication of the notice in The New Haven Journal Courier, The Hartford Daily Courant, The Boston Herald, The Providence Journal and The Wall Street Journal. Moreover, the notice as published did not name The City of New York. The first four of these newspapers are listed in N. W. AYER & SONS, *Directory of Newspapers and Periodicals* for 1935 and 1936, as daily newspapers of general circulation. The Wall Street Journal is listed as a daily *financial periodical*. In 1935, the circulation of the Wall Street Journal was 28,537. The United States official census figures for the population of New York City for the year 1930 were 6,930,446. Thus, the circulation of this financial periodical reached approximately 0.4% of the population of The City of New York. Contrasted with this percentage figure of circulation the other newspapers in which publication was provided had circulations which bore far greater proportions to the population of the cities in which they were published, as indicated in the following table:

Newspaper	1935 Circulation	U. S. Census (1930)	Ratio of Circulation to Population
New Haven Journal-Courier.....	17,613	162,655	10.8%
Hartford Daily Courant.....	36,088	164,072	22 %
Boston Herald	119,647	781,188	15.3%
Providence Journal	41,556	252,981	16.4%

Similar results would follow from an analysis of the 1936 circulation figures. Thus, the complete inefficacy of the constructive notice here relied upon is demonstrated.

effect of the decision is that whenever the City of New York learns in some fashion, however fortuitous, that a railroad is going through reorganization somewhere within the territorial jurisdiction of any of the Federal Courts, the City of New York is charged with the affirmative duty of searching the files of each and every such reorganization proceeding to find out if the interests of the City of New York are in any way affected thereby. What is more, the City must also search the titles of each parcel of real property in the City of New York * to determine whether any of such parcels are owned by railroads going through reorganization. As we have already pointed out, the City does not and is not required to have a system by which it can tell who are the proper owners of each piece of land against which local assessments and real estate taxes may be laid. Where, as here, the Debtor's Trustees had only to include the City of New York in the list of known creditors to be notified of the bar order by mail, it seems pointless to insist that the fiction of constructive notice should be carried to the extremes above outlined.

Aside from the impracticality of the course of conduct which the lower Courts' decision requires, the decision below creates a situation which is manifestly unjust. The City of New York knew of the proceedings, it is true, but it may also be assumed that it knew that the statute entitled it to reasonable notice of a bar order. It had every right, therefore, to wait to file its claim until it received such a notice, particularly since the Debtor knew of its existence.

Nowhere in § 77 is there contained a specific statutory provision imputing knowledge of the bar order to anyone having mere knowledge of the reorganization proceedings. To hold that such knowledge of the pendency of the reorganization proceedings, without more, constitutes knowl-

* There are approximately 840,000 separately assessed parcels of real property in the City of New York. *Annual Report of the Tax Commission and the Tax Department to the Mayor of the City of New York*, September 12, 1952, pp. 14-15.

edge of a notice to file claims on pain of being barred for failure to file, is as obvious a deprivation of property without due process as may be imagined.

This is, then, a case where a debtor, by its own admission, has pursued a course of conduct deliberately intended to foreclose the rights of the creditor with no judicial inquiry whatsoever into the validity or invalidity of the creditor's claim. With knowledge of the City's claim and, of course, of the name and whereabouts of the City, the Debtor chose, instead of the simple expedient of notifying the City by mail, to conceal from the Court in every stage of this proceeding the fact that the City of New York had a claim against the Railroad. As against this barefaced insistence upon a highly technical interpretation of a complicated statute without moral or equitable support therefor, a consideration of the equities sustaining the City's position points inevitably to the conclusion that justice will be done in this case only if the City's liens are permitted to continue in existence.

For one thing, even if the City had had full knowledge of the proceedings and of every step taken therein, it had every reason to believe that it need not file claims for its tax liens, bar order or no. The necessity for filing such claim is raised for the first time in this proceeding.

Presumably, the Debtor and its Trustees were equally aware of the open status of this question. With this awareness it seems obvious that the proper way to have determined the question would have been on specific notice to the City.

Secondly, there is every reason to believe that the provisions of the Plan of Reorganization of this Debtor were not intended to affect the City's liens. We do, in fact, argue in Point IV, *infra*, that the proceedings had in reorganization of the Railroad were not intended to and did not materially or adversely affect the City's liens. Of course, if that was the actual intent of the Plan of Reorganization, then the City's liens must necessarily be saved. But even if this was not the actual intent, certainly there was enough

to cause the City to conclude quite reasonably that such was the Plan's apparent intent. As Judge FRANK, in his dissenting opinion below, observed (197 F. 2d, p. 434; R. 105):

"In any case, whatever the proper construction of the plan, the questions were close enough, I think, to excuse the City from jumping from the knowledge of the proceedings to the knowledge that it must file a claim. How much trouble would have been saved if the judge in accord with the statute, had only directed the trustees to mail notices to all known creditors to file their claims."

POINT IV

Assuming *arguendo* that without specific notice to the City a Plan of Reorganization might have been adopted affecting the City's assessment liens, the record shows that the proceedings had in reorganization of the Railroad the Plan of Reorganization certified by the Interstate Commerce Commission, and the Consummation Order and Final Decree were not intended to and did not materially or adversely affect such liens.

The argument under Points I to III inclusive proceeded on the alternative assumptions that the City was or was not a creditor within the terms of § 77. The discussion under this point is not related to those assumptions but develops an argument based on the factual record of the proceedings to reorganize the Railroad Debtor; *i.e.*, that the City's assessment liens were not intended to be affected thereby.

No statement or indication of intent to bring the tax liens of the City of New York within the scope of the reorganization will be found in the voluminous record of the proceedings to reorganize the New York, New Haven and Hartford Railroad Company. On the contrary, it is quite clear from the affidavit of George H. Webster, the

Railroad's Tax Agent, that the District Court and the Interstate Commerce Commission were never apprised of the existence of these liens (R. 18). What is more significant is that at every stage of the reorganization proceedings pre-existing tax liabilities were recognized as obligations to be paid in full, or, if not paid, assumed by the reorganized Debtor.

The validity of the City's assessment liens was never attacked in the reorganization proceedings. Accordingly, it must be assumed, as was done by the Courts below, that for all purposes in connection with this application, these assessment liens were valid (R. 82). Consequently, if it may be demonstrated that pre-bankruptcy taxes and assessments were not intended to be materially and adversely affected by the Plan of Reorganization, it necessarily follows that the City's assessment liens have also been preserved.

Order No. 1, approving the petition in reorganization of the respondent, recognized the duty and obligation of the Debtor to pay taxes and assessments which had theretofore become due (R. 42). Thus, from the very outset, the Debtor and its Trustees, in their discretion, were specifically authorized to pay *all taxes and assessments due upon the properties of the Debtor*. This was obviously interpreted by the Debtor itself to mean that pre-existing tax liabilities were not to be affected by the Plan of Reorganization because the statement of assets and liabilities which it filed in the reorganization proceedings did not include pre-existing tax liabilities (R. 20). Only by further order of the Court could the payment of pre-existing tax liabilities be enjoined (R. 42). It may be noted here that at no stage of the proceedings was any further order of the District Court made enjoining the payment of the City's assessment liens.

In the Courts below, the City of New York pointed out that the provisions regarding notice contained in Order No. 1 (R. 46-47) called for notice of the provisions of said

order to be given by mail to the mortgage trustees, and by publication only to "its creditors and stockholders." Order No. 32 (the bar order) directed that notice of the order be given by mail to the mortgage trustees and "to such others as have entered their appearances herein" and by publication to its other creditors (R. 41). We argued that these notice provisions, read together with the requirement in Order No. 1 that taxes and assessments already due be paid, imported an intent to leave pre-existing tax liens undisturbed. Since tax liens are unquestionably paramount to mortgage liens, it seems obvious that, had it been intended to materially or adversely affect pre-existing tax liens by the reorganization proceedings, notice at least equal to that given to the mortgagees would have been provided.

The Courts below rejected this argument on the ground that "it would be preposterous to construe the substantive provisions of a plan confirmed in 1945 by reference to the terms of an *ex parte* administrative order of notice entered in 1936 before any plan at all had been formulated." 105 F. Supp., at p. 418 (R. 87). We respectfully submit that the lower Courts failed to realize the full implications of Order No. 1, in which the Debtor was specifically authorized to pay all taxes and assessments which had theretofore become due. The plain language of the order required the Debtor to pay assessments of the character here involved and we submit that the District Court's characterization of that construction as preposterous is certainly unwarranted.

We also pointed to the provisions of Order No. 736, dated March 13, 1944, which set up a classification of creditors and stockholders and which nowhere among such classes made provision for inclusion of the assessment liens of the City of New York (R. 50-54). This, too, we contended, was a demonstration of lack of intent materially and adversely to affect the City's assessment liens. An examination of the classification of creditors and stockholders will

quickly reveal that the highest type of creditors classified therein were mortgagees (*ibid.*): We would not expect to find tax liabilities which accrued during the reorganization proceedings in this classification because they were administration expenses which had to be paid; but if pre-existing tax liabilities had been intended to be affected by the Plan of Reorganization, it seems obvious that a classification would have been set up for them. The absence of such a classification argues strongly for the proposition that pre-existing tax liens were intended to be recognized in full from the very inception of the reorganization proceedings.

This argument, too, the Courts below have rejected. The absence of any approved claim was seized upon as the real reason for not including the City in the classification (105 F. Supp., at p. 418; R. 87). But as we have already pointed out (*infra*, p. 35), the record strongly indicates that the real reason why the City's assessment liens and all other pre-existing tax liabilities were omitted from the classification was that they were not intended to be adversely affected by the reorganization proceedings.

Furthermore, Order No. 736 furnishes additional evidence of the District Court's failure to comprehend fully the scope of the proceedings which were before it and the requirements of § 77 under which it acted. It will be seen from the provisions of Order No. 736 that, after approving a classification of creditors and stockholders, the Court ordered a transmission to the Interstate Commerce Commission of "lists of all known stockholders and creditors of the debtors *herein included* in any of the foregoing classes, * * * and the debtors' trustees within said time [60 days from the date of Order No. 736] shall file said [lists *herein*]" (R. 53-54; emphasis supplied). The time for filing the lists of the known stockholders and creditors was extended to June 12, 1944, by Order No. 736A (R. 54). These lists of creditors and stockholders, as finally submitted by the Trustees on June 10, 1944, did not contain the name of the City of New York (R. 62-63).

In requiring the Trustees to file lists of only those creditors included in the order of classification, the District Court erred in limiting the required list of creditors to those who had already filed claims. It is clear from the provisions of § 77 that the list of creditors which the Debtor is required to file has no relation to whether or not the creditors have or have not filed claims.

Section 77(c)(4) provides that the judge shall require the officers of the debtor or trustee to file, among other things, a list of all *known* bondholders and creditors of the debtor in lieu of the schedules required by § 7 "of this Act". This subdivision also provides that the contents of such lists shall not constitute admissions by the debtor or the trustees. It is thus obvious that "known" creditors does not mean creditors who have filed claims.

It is submitted that the statute did not intend that the Trustees could wait until claims had been filed before drawing up a list of known creditors and then limiting that list to creditors who had already filed claims. It should not be forgotten that the provisions of § 77(c)(4) bear the same relation to proceedings under § 77 as the provisions of § 7 bear to ordinary bankruptcies. Just as in ordinary bankruptcies the filing of a list of creditors precedes the filing of notices of claims, so, too, in § 77 proceedings the filing of a list of "known" creditors under § 77(c)(4) should precede the fixing of a reasonable time within which claims may be filed and notice thereof given under § 77(c)(7), (8). Our insistence upon this chronology of procedure is not specious; if the District Court had required the filing of the list of known creditors and stockholders at the time when § 77 required it to be filed, that list would have been submitted by the Debtor in advance of expiration of the period for filing of claims. If the list, under such circumstances, would still have omitted the name of the City of New York, it would then have been perfectly clear that the City was not to be considered as a creditor and that its

assessment liens were not to be affected by the Plan of Reorganization.

Further evidence of lack of intent to materially or adversely affect the City's pre-existing tax liens is contained in the first report of the Interstate Commerce Commission approving the original Plan of Reorganization. This report stated that the Plan should provide for the satisfaction of (a) current liabilities of the Debtor incurred in the ordinary conduct of its business prior to the institution of the reorganization proceedings which were entitled to priority over any mortgages of the Debtor; (b) current liabilities and obligations of the bankruptcy trustees incurred during the reorganization proceedings; (c) expenses of reorganization allowed by the Court; and (d) claims for interest and principal not paid at maturity because not presented for payment (R. 48).

It will be observed that this portion of the report makes provision for payments in a manner similar to the provisions of § 64 of the Bankruptcy Act. The report speaks of liabilities incurred in the conduct of business, expenses of reorganization and claims for interest and principal. These are debts and do not include tax liens. It follows, consequently, that what the Interstate Commerce Commission had in mind was the establishment of a system of priorities in payment of debts. But there is no indication here or elsewhere in the report that there was any intention to disturb the validity of pre-existing tax liens.

Furthermore, Section L of the Plan provided as follows (R. 71):

"Claims against the principal debtor and secondary debtors, other than Old Colony, entitled to priority over their respective mortgages, and current liabilities and obligations incurred by the bankruptcy trustees during the reorganization proceedings, to the extent unpaid at the date of confirmation of the plan, shall be paid in cash or assumed by the reorganized company with the same relative priority as they now have with respect to other obligations of such debtors."

The end result of the reorganization proceedings was the deed conveying all of the Debtor's property from the Trustees to the respondent, the reorganized Debtor (R. 29-30). This conveyance dated September 18, 1947 was executed in compliance with the Consummation Order and Final Decree of the District Court, which also approved the form of the deed (Order No. 1007; R. 30-31). Significantly, this conveyance was made "subject to the liens of taxes and assessments lawfully levied or assessed against" the real property conveyed (R. 30). This language is consistent with the contention of the City that pre-existing tax liabilities were not intended to be affected by the reorganization.

CONCLUSION

The judgment of the Court of Appeals should be reversed, the order and decree of the District Court vacated, and the cause remanded for further proceedings not inconsistent with the declaration that the assessment liens of the City of New York, set forth in Exhibit A attached to the petition herein, are and continue to be valid and subsisting liens.

December 3, 1952.

Respectfully submitted,

DENIS M. HURLEY,

Corporation Counsel,

Counsel for Petitioner,

The City of New York.

SEYMOUR B. QUEL,

HARRY E. O'DONNELL,

MEYER SCHEPS,

ANTHONY CURRERI,

of Counsel.

APPENDIX

Section 57 (n) of the National Bankruptcy Act (11 U. S. Code, § 93 [n]), as enacted June 22, 1938, 52 Stat. 867, Chap. 575, read as follows:

"n. Except as otherwise provided in this Act, all claims provable under this Act, including all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: *Provided, however,* That the court may, upon application before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States or any State or subdivision thereof: *Provided further,* That, except in proceedings under chapters X, XI, XII, and XIII of this Act, the right of infants and insane persons without guardians, without notice of the bankruptcy proceedings, may continue six months longer: *And provided further,* That a claim arising in favor of a person by reason of the recovery by the trustee from such person of money or property, or the avoidance by the trustee of a lien held by such person, may be filed within thirty days from the date of such recovery or avoidance, but if the recovery is by way of a proceeding in which a final judgment has been entered against such person, the claim shall not be allowed if the money is not paid or the property is not delivered to the trustee within thirty days from the date of the rendering of such final judgment, or within such further time as the court may allow. When in any case all claims which have been duly allowed have been paid in full, claims not filed within the time hereinabove prescribed may nevertheless be filed within such time as the court may fix or for cause shown extend and, if duly proved, shall be allowed against any surplus remaining in such case."

Section 64, subdivision a of the National Bankruptcy Act (11 U. S. Code, § 104), as it existed prior to October 23, 1937 (the date of the filing of the petition in reorganiza-

"§ 64. Debts which have priority. (a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in the order of priority as set forth in paragraph (b) hereof: *Provided*, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments the trustee shall be credited with the amounts thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

Section 64, subdivision a, of the National Bankruptcy Act (11 U. S. Code, § 104), as amended June 22, 1938, 52 Stat. 874, Chap. 575, read as follows:

"Sec. 64. Debts Which Have Priority.—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the filing fees paid by creditors in involuntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; the costs and expenses of administration, including the trustee's expenses in opposing the bankrupt's discharge, the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow; (2) wages, not to exceed \$600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, serv-

or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; (3) where the confirmation of an arrangement or wage-earner plan or the bankrupt's discharge has been refused, revoked, or set aside upon the objection and through the efforts and at the cost and expense of one or more creditors, or, where through the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced resulting in the conviction of any person of an offense under this Act, the reasonable costs and expenses of such creditors in obtaining such refusal, revocation, or setting aside, or in adducing such evidence; (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: *Provided*, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further*, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; and (5) debts owing to any person, including the United States, who by the laws of the United States is * entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law: *Provided, however*, That such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy."

Section 67, subdivision b, of the National Bankruptcy Act (41 U. S. Code, § 107), as enacted June 22, 1938, 52 Stat. 876-877, Chap. 573, read as follows:

"b. The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against

the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII, or XIII of this Act, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of the property, they shall instead be perfected by filing notice thereof with the court."

Section 67, subdivision d, of the National Bankruptcy Act (11 U. S. Code, § 107), as it existed on October 23, 1935 (the date of the filing of the petition in reorganization), read as follows:

"(d) Liens given or accepted in good faith and not in contemplation of or in fraud upon the provisions of this title, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by anything herein."

Section 77(b) of the National Bankruptcy Act (11 U. S. Code, § 205), enacted March 3, 1933, 47 Stat. 1475, Chap. 204, read in part as follows:

"The term 'creditor' shall, except as otherwise specifically provided in this section, include, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims, interests, or securities of whatever character against the debtor or its property, including claim for future rent, whether or not such claims, interests, or securities would otherwise constitute provable claims under this title."

Section 77(b) of the National Bankruptcy Act (11 U. S. Code, § 205), as amended August 27, 1935, 49 Stat. 913,

"The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

"The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character."

Section 77(c)(4) of the National Bankruptcy Act (11 U. S. Code, § 205), as enacted August 27, 1935, 49 Stat. 915, Chap. 774, reads as follows:

"(4) The judge shall require the officers of the debtor or the trustee or trustees, at such time or times as the judge may direct, and in lieu of the schedules required by section 25 of this title, to file with the court such schedules and submit such other information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan; and shall direct the officers of the debtor, or the trustee or trustees, within such time as the judge shall set, to prepare and file with the court a list of all known bondholders and creditors of the debtor, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each bondholder and creditor, and a list of all known stockholders of the debtor, with the last known post-office address or place of business of each, which lists the judge may require to be brought down to date at any time. The contents of such lists shall not constitute admissions by the debtor or the trustees in a proceeding under this section or otherwise."

Section 77(c)(7) of the National Bankruptcy Act (11 U. S. Code, § 205), as enacted August 27, 1935, 49 Stat. 915-916, Chap. 774, reads as follows:

"(7) The judge shall promptly determine and fix a reasonable time within which the claims of creditors

not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests. Such division shall not provide for separate classification unless there be substantial differences in priorities, claims, or interests. The trustee or trustees under any mortgage, deed of trust, or indenture outstanding against the property may, within the time prescribed, file a verified claim in behalf of all bonds or securities outstanding under such mortgage, deed of trust, or indenture, in which event it shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf, but nothing herein shall constitute such trustee or trustees the representative or representatives of such holders for the purpose of accepting or rejecting any plan of reorganization."

Section 77(c)(8) of the National Bankruptcy Act (11 U. S. Code, § 205), as enacted August 27, 1935, 49 Stat. 916, Chap. 774, reads as follows:

"(8) The judge shall cause reasonable notice of the period in which claims may be filed, of hearings on application for the dismissal of the proceedings, or for the final allowance of fees or expenses to be given creditors and stockholders by publication or otherwise."

Section 77(1) of the National Bankruptcy Act (11 U. S. Code, § 205), as enacted August 27, 1935, 49 Stat. 922, Chap. 774, reads as follows:

"(1) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered."